

**Town of Amherst**  
**Zoning Board of Appeals**

*DECISION*

**Applicant:** Boothroyd, J., et al, c/o Robert Quinn, Esq.

**Date application filed with the Town Clerk:** June 22, 2009

**Nature of request:** Appeal of a decision of the Building Commissioner requesting enforcement of the Amherst Zoning Bylaw and the Comprehensive Permit issued by the Zoning Board of Appeals to HAP, Inc., on or about February 22, 2002, and, among other actions, withdrawal of four (4) building permits issued for the project, pursuant to the appeals filed on April 16, 2009 and May 29, 2009, and consolidated by agreement with the Amherst Town Counsel, under Section 10.1 of the Zoning Bylaw.

**Address:** 12 Longmeadow Drive (Map 22B, Parcel 31, RO District)

**Legal notice:** Published on July 8 and July 15, 2009 in the Daily Hampshire Gazette and sent to abutters on July 7, 2009

**Board members:** Tom Simpson, Hilda Greenbaum and Tom Ehrgood

**Submissions:**

- A. Letter from Robert Quinn, dated April 16, 2009;
- B. Letter from Karen Leveille, dated April 28, 2009;
- C. Letter from Robert Quinn, Esq., dated May 29, 2009;
- D. ZBA application form, Exhibit A and Exhibit B filed with the Town Clerk on June 30, 2009;
- E. Memorandum, ZBA FY2009-00042, dated July 16, 2009;
- F. Submission by Robert Quinn, received on July 23, 2009, including exhibits 1-16;
- G. Letter from Thaddeus Dabrowski, dated July 23, 2009, including photographs;
- H. Letter from Connie Kruger, dated July 23, 2009, including On The Ground;
- I. Letter from Sean Werle, dated July 23, 2009;
- J. Letter from Felicity Hardee, dated August 6, 2009;
- K. Letter from Robert Quinn, dated August 18, 2009;
- L. Memorandum ZBA FY2009-00042 (2), dated August 21, 2009;
- M. Letter from John Boothroyd, received on August 21, 2009;
- N. Letter from Konnie Fox, dated August 25, 2009;
- O. A partial copy of Chapter 40B, Section 20 and HAP's application for a Comprehensive Permit submitted by Robert Quinn on August 25, 2009.

**Site Visit:** July 20, 2009

Tom Simpson, Hilda Greenbaum and Tom Ehrgood met Karen Leveille, Project Manager for HAP, Inc. at the site. Ms. Leveille displayed a context map and a proposed layout plan, for reference.

The Board members observed the following:

- The location of the existing, partially overgrown driveway, leading gradually uphill towards the approximate center of the property;
- The location of the existing farmhouse building, mostly boarded up, with some overgrown vegetation around its perimeter;
- The approximate location of the northerly property line running along the top an existing embankment;

- The location of an existing mature stand of vegetation near the north and northeast property line between Longmeadow Drive and the existing farmhouse;
- From the approximate north property line looking generally south, the Board members observed the general location and view toward the proposed Building B;
- From the existing paved driveway and parking area, the Board members observed the existing wood line but did not enter the un-mowed portions of the site;
- From the approximate center of Longmeadow drive looking south, the Board members observed the approximate location of the east property line and the location of the existing dwelling and rear yard of the property adjacent to the east property line.

**Public Hearing:** July 23, 2009

Mr. Simpson stated that the petitioner, Robert Quinn, Esq., had agreed to grant an extension of the filing deadline of the appeal to October 30, 2009, due to scheduling conflicts among involved parties and members of the Zoning Board of Appeals.

Mr. Simpson MOVED to accept the letter of extension, filed with the Town Clerk on July 23, 2009, allowing a final deadline for the appeal of October 30, 2009. Ms. Greenbaum seconded the motion and the Board VOTED unanimously to accept the letter.

Mr. Quinn presented the petitioner's appeal. He was accompanied by Shaun Werle, Steven Toutant, and Thaddeus Dobrowski. Felicity Hardee presented responses from HAP. She was accompanied by Tom Jenkins of Baystate Environmental Consultants, Karen Leveille, Project Manager, and Gregory Zizorski, Architect for Studio One Design.

Mr. Quinn submitted a document dated July 23, 2009, which includes exhibits 1-17. He stated that he is representing a group of concerned citizens who are requesting that four (4) building permits issued in March, 2009, be rescinded, that the Zoning Board engage a private consultant, at HAP's expense, to inspect the existing farmhouse, and to inform HAP that the farmhouse shall not be demolished unless the Comprehensive Permit is modified. Mr. Quinn stated that there have been a series of significant changes to the plans that require modification of the Comprehensive Permit.

**Wetlands**

Mr. Quinn stated that the first issue of significant change concerns wetlands. He stated the following:

- The Comprehensive Permit decision [Exhibit 6] includes the Conservation Commission recommendation that the isolated wetlands be protected;
- The 2008 plans show a road crossing isolated wetlands resulting in the destruction of a portion of the wetland and the area where it is to be replicated;
- The Comprehensive Permit was appealed in 2002 by the neighbors. Upon a ruling in their favor in 2007, HAP appeared before the Conservation Commission with plans showing the paving of a portion of the isolated wetland they previously stated was going to be protected;
- In October 2007, the Conservation Commission declined to assert jurisdiction over the wetlands. The petitioners filed an appeal of that decision with the Massachusetts Appeals Court. The decision is still pending;
- When HAP submitted the 2008 plans as part of the building permit applications, they falsely portrayed to the Building Commissioner that the wetland issue had been resolved. If the court rules in favor of the petitioner, the revised plans would need to go back before the Conservation Commission and ultimately the Comprehensive Permit would need to be modified by the Zoning Board of Appeals;
- The Zoning Board only assumes jurisdiction over those aspects of a project where a specific waiver has been requested from a local law, such as height, setbacks or density has been requested. HAP never asked permission to pave over the isolated wetland;
- The petitioners believe the building permits should be revoked because the project will not be built in accordance with the plans approved in 2001.

Ms. Hardee, attorney for HAP, stated the following:

- Mr. Quinn's testimony underscores the obstacles that HAP has had to overcome in order to exercise its right to act on the Comprehensive Permit by filing lawsuits that have resulted in lengthy and costly litigation, all of which have been decided in HAP's favor;
- The extent of the wetlands on the property may have changed, but the project has remained the same and the issue before the Board members is whether the Building Commissioner correctly issued the building permits for the project;
- In 2007, HAP went before the Amherst Conservation Commission where it was determined that they do not have jurisdiction over the wetlands in this situation. The petitioners appealed that decision to the Massachusetts Superior Court, who decided in HAP's favor. The petitioners have again filed an appeal of that decision which appeal is pending before the Massachusetts Appeals Court;
- The Comprehensive Permit governs what HAP is allowed to do: that is to develop the property in conformance with the plans approved in 2001. She added that the regulation of isolated wetlands is subsumed by the Comprehensive Permit.

Mr. Bard stated the following:

- In 2007, it was determined that the issue of the isolated wetland did not belong before the Conservation Commission because it was an issue over which the Zoning Board of Appeals had taken jurisdiction of as part of the Comprehensive Permit;
- The issue currently being litigated is not an issue of whether or not the wetlands had grown or whether or not the project had changed, but rather which board has jurisdiction over the issue: the Conservation Commission or the Zoning Board of Appeals as part of the Comprehensive Permit.

Ms. Greenbaum asked whether the pending appeal needs to be resolved for HAP to gain access to the site and begin construction. Mr. Jenkins stated that all the buildings could be built without the creation of the proposed road over the isolated wetland. Ms. Hardee stated that if the building permits were in place, HAP could proceed with the project before the decision of the Appeals Court is rendered. Mr. Bard stated that the nature of the pending appeal is an issue of jurisdiction and would not stop the project from proceeding if building permits were in place.

Mr. Ehrgood asked who is responsible for determining whether the wetland replacement ratio of 1.5 to 1 is adequate. Ms. Hardee stated that it is not necessary to make that determination. Mr. Quinn stated that no one is making that decision because the Conservation Commission declined to take jurisdiction.

Ms. Greenbaum asked if the location of the road had changed and if it were possible that the flooding of neighboring properties was due to the water table. Ms. Hardee stated that the location of the road is unchanged from the location approved in the 2001 plans. Mr. Jenkins stated that the isolated wetlands do not appear to contribute to the flooding of neighboring properties because the wetland is at a higher elevation and is created by the soil composition in that one location.

Mr. Jenkins explained that the more recently discovered portion of the wetland will be the only section that is affected by the construction of the road. The portion of the wetland identified in 2001 will remain intact, with the replicated wetland being situated directly adjacent and connected to the original wetland.

John Boothroyd, 22 Longmeadow Drive, Linda Stark, 24 Applewood Drive, Thaddeus Dobrowski, 9 Squire Lane, and Kathleen Murphy, 73 Farmington Road stated that the building permits should be revoked.

Connie Kruger, 15 Hop Brook Road, stated that she believed the building permits should not be revoked and submitted a letter, dated July 23, 2009 and a copy of *On the Ground: 40B Developments Before and After*, dated May 1, 2009. Shaun Werle, of Montague, stated that over the years his property of 36 Longmeadow Drive had sustained serious water damage in the basement which he contends was a result of runoff associated with the property of 12 Longmeadow Drive.

**Farmhouse**

Mr. Quinn stated that the second issue of significant change concerns the configuration and renovation of the existing farmhouse. He stated the following:

- HAP proposes to demolish the existing farmhouse in violation of the Comprehensive Permit, which requires it be preserved and renovated;
- HAP's architect indicated in a letter [Exhibit 11] that the farmhouse will be deconstructed and replicated; only a small portion of the farmhouse will be salvaged. He added that the configuration of the farmhouse is substantially different from the 2001 and 2008 plans and that HAP has already demolished a portion of the building.

Mr. Dobrowski spoke to the history of the property and building. He stated the following:

- The building is historical and will be lost if the building permits are granted;
- He submitted a series of annotated photographs, dated July 23, 2009, which show the deteriorated condition of the existing farmhouse;
- HAP should be required to pay for an independent structural engineer, retained by the Zoning Board of Appeals, to determine if the dwelling is salvageable.

Ms. Hardee stated the following:

- The farmhouse will not be demolished;
- The building was in relatively poor condition when HAP acquired ownership of the building and that the lengthy appeal process that has ensued hampered their ability to begin renovation of the building.

Mr. Zizorski, of Studio One Inc., stated the following:

- He is the project architect and accepts responsibility for the nature of the construction associated with the farmhouse and stated that the building can be restored;
- The farmhouse will not be demolished, but will be renovated;
- A field investigation of the farmhouse revealed that the dwelling is capable of being renovated and that the 2008 plans reflect the intention to save the structure.

Mr. Ehrgood asked what was meant by the assertion that the building would be replicated with a small portion being salvaged. Mr. Zizorski stated that the building will be completely renovated and that the interior will be deconstructed. Mr. Ehrgood asked if there is any question that a building in a certain state of disrepair cannot be renovated. Mr. Zizorski stated that the building is fully capable of being renovated. He stated that the development team, including the general contractor, investigated the building and all parties agreed that the building is a prime candidate for renovation.

Mr. Ehrgood asked the Building Commissioner how or if she would know whether the building is being renovated or demolished. Ms. Weeks stated that inspections are required at multiple stages of construction. She added that the Building Commissioner relies on a project engineer or architect to determine whether or not a building is salvageable and to provide the necessary evidence required to accomplish such a renovation. She stated that the Comprehensive Permit requires preservation and renovation and that there are no strict standards for this work. She stated that this is a typical renovation for which she believes the architect has provided sufficient information to assure her that it can be done.

Mr. Simpson asked Mr. Quinn which condition of the Comprehensive Permit requires the farmhouse to be preserved. Mr. Quinn directed the Board to page 7 of the Comprehensive Permit, which states that the existing farmhouse will be preserved and renovated to contain two units. He stated that the appellants are requesting the Board to engage an independent structural engineer, at HAP's expense, to identify whether the building needs to be demolished and therefore obtain an amendment to the Comprehensive Permit. Mr. Simpson stated that the decision cites HAP's intention to preserve and renovate the farmhouse; however there are no conditions of the permit mandating such action.

Peter Jessop, 120 Pulpit Hill Road, owner of Integrity Development and Construction, stated that he holds an unrestricted supervisor's license. He stated that in his personal experience, there is rarely a building that cannot be renovated. He stated that if the architect says that it will be renovated and that is reflected on the plans, then that is what has to be done. He stated that he has a lot of experience with the Building Department and that he believes they will oversee the project diligently.

Vincent O'Conner, 179 Summer Street, stated that the Board must determine if the Comprehensive Permit has become invalid by virtue of the misconduct of HAP and believes that no building permit can be issued pursuant to the Comprehensive Permit.

Flo Stern, 35 Potwine Lane, stated that if HAP were allowed to start the project when it was originally approved there would not have been any deterioration of the building.

Ms. Greenbaum asked if HAP was restricted from doing work to protect the house from further deterioration during the ongoing litigation. Ms. Hardee stated that they were restricted because a building permit would have been necessary for the kind of repairs that were needed.

### **Play Area**

Mr. Quinn stated that the third issue of significant change concerns the location and size of the playground. He stated the following:

- In 2002, the Zoning Board of Appeals was clearly concerned that the size of the play area be adequate for the anticipated 50-60 children. The Comprehensive Permit decision states that the Zoning Board of Appeals requested a play area be included as part of the project;
- The 2001 layout plan shows an expansive playground area with what appears to be a swing set and other equipment where the 2008 layout plan shows a small playground area surrounded by buildings and driveways;
- The change to the location of the playground area is significant and therefore the building permits should not be issued.

Ms. Hardee referred to site plans for the play area. She stated the following:

- The 2001 plan shows a play area with several structures located close to the north boundary with Mr. Boothroyd's property. The 2008 plan shows the play area located in the area near the community room;
- A detail plan of the play area in the construction drawings shows each individual play structure. The level of detail in the construction drawings is more than what is required for the permit set of drawings;
- The reason that the play structures were moved is HAP believed it would be safer and better for the neighborhood if the children were supervised while playing. Parents using the laundry room in the community building closest to the play area can supervise the children.

Mr. Ehrgood asked whether the scope of the play area on the 2008 plan is the same as the play area on the 2001 plan. Mr. Jenkins stated that the size of the play area on the 2008 plan is actually larger. He added that a detail of the play area was not required in 2001. The detail in the 2008 plan shows that the play area consists of an improved soft surface where the equipment is located, surrounded by a hard surface for handicap accessibility and a required safety zone around the perimeter.

### **Drainage Design**

Mr. Quinn stated that the fourth issue of significant change concerns the grading and drainage plans. He stated the following:

- The neighborhood has continually experienced flooding problems including water in basements and on properties. The 2001 grading and drainage plan shows a storm drain line and a manhole catch basin in front of Building C which is not shown on the 2008 plans;

- The 2001 plan shows two storm drain lines and manhole catch basin in the southwest corner of the site, but the 2008 plans show that a portion of the line and a catch basin have been eliminated;
- The 2001 plan shows one manhole and storm drain line from Building C toward the farmhouse, but the 2008 plan shows two lines and two manholes;
- The new design should be reviewed and approved by the Town Engineer; although these changes may appear minor, they constitute a significant change in the design of the plan.

Mr. Jenkins referred to the 2001 and 2008 plans and stated the following:

- There is no change to the overall storm water design or management plan;
- As they went from the preliminary design plans of 2001 to the construction plans of 2008, issues such as grade pitches, handicap accessibility and parking have required the refinement and shifting of some aspects of the drainage system;
- The trunk lines, the amount of storm water that gets into each manhole, and the amount of water going into the catch basins are all the same.

### **Impervious Surfaces**

Mr. Quinn stated that the fifth issue of significant change concerns an increased amount of impervious surfaces. He stated the following:

- The 2008 layout plan shows new areas of impervious surfaces. The changes include additional paved walkways, bulkheads and other appendages to buildings; each change will impact the storm water runoff on the site;
- HAP has not done any new storm water calculations to determine whether the storm water will be kept on site;
- The Building Permits should be revoked and that HAP should be required to re-calculate the storm water impacts, obtain the approval of the Town Engineer, and then obtain an amendment to the Comprehensive Permit.

Mr. Jenkins referred to the 2001 and 2008 plans and stated the following:

- There were minor changes to the walkways, primarily due to the grades associated with the parking areas, and the actual net change in the area of walkways was a net decrease of 24 sq. ft;
- Regarding the number of bulkheads, the 2001 plans showed that Building C contained eight bulkheads. The 2008 construction plans show a total of six bulkheads which have been distributed among the other buildings.

Mr. Ehrgood asked Mr. Quinn whether he acknowledges that there would be some differences between the 2001 and 2008 plans or whether an applicant should be expected to submit a construction set of drawings at the permitting phase. Mr. Quinn stated that there may be changes between the plans, but that they cannot be significant changes. He added that if a contractor reviews plans approved with a permit and determines that they cannot build according to those plans or the changes are significant, then the developer should go back and amend the permit.

Mr. Ehrgood asked the Building Commissioner whether, in a complicated proposal, preliminary plans approved by the Zoning Board of Appeals might be different from the final construction plans. Ms. Weeks stated that they often are different. She added that she is required to make a determination as to whether the changes are significant. In certain cases, if the magnitude of the changes is questionable, she will require an applicant to ask the Zoning Board of Appeals to review the plans at a public meeting and determine whether the changes are significant. In this case, she believed that the changes were largely those that would occur during the time that the preliminary plans were approved and the preparation of final construction plans.

Ms. Greenbaum asked Mr. Toutan what evidence he has that the flooding problem is caused by runoff from the adjacent property. Mr. Toutan said that he had no evidence. Ms. Greenbaum stated that detention basins are provided in the drainage and grading plans which are required to ensure that all storm water runoff remains on the project site.

Mr. Jenkins stated that the storm water management system for the project site has been prepared by professional engineers in accordance with the applicable state laws and was previously approved by the Town Engineer.

Mr. Bard stated that the Board must determine the following:

- Whether or not the changes that have been highlighted by the appellant are significant;
- Whether the changes to the drainage system design are significant enough that the system would no longer function as was originally approved;
- Whether the play ground is comparable to what had been shown on the original plan;
- Whether the bulkheads or walkways create more impervious surfaces.

Penny Rose, 173 Pondview Drive, asked the Board to look at the potential drainage issues from a neighborhood perspective.

Vincent O'Conner, 179 Summer Street, stated that the determination of whether the changes are significant should be brought before the Zoning Board of Appeals as a modification of the Comprehensive Permit and that the determination should not be made by the Building Commissioner.

Peter Jessup, 120 Pulpit Hill Road, stated that the responsibility to determine whether or not changes are significant or *de minimis* is appropriately placed with the Building Commissioner. He added that the changes to drainage plans are minor and were prepared by a licensed engineer, the play ground area is comparable and the bulkheads are fewer and therefore the changes should not be considered significant.

Irv Rhodes, 173 Pondview Drive, asked whether the Fire Department has reviewed the plan. Mr. Jenkins stated that the Fire Department has reviewed the plans.

Steven Toutan, former owner of 14 Greenwich Road, presented photographs of the property showing flooding on the property.

Mr. Ehrgood asked Mr. Quinn if he withdraws his points about changes to the entry way and the manager's apartment. Mr. Quinn stated that he believed that there were changes to the entry way discussed, but could not specify what they were and that he had no statement regarding the manager's apartment.

### **Contaminated Soils**

Mr. Quinn stated that he had an additional issue concerning the presence of hazardous chemicals on the site. He stated the following:

- Prior to the approval in 2002, HAP did not disclose to the ZBA that the site was contaminated with hazardous chemicals including lead and arsenic;
- HAP had hired an environmental consultant to assess the property. The report [Exhibit 13, 14, 15] indicated that the soil tests completed in the fall of 2001 showed there was a residue of arsenic and lead. The report indicates that lead was found in all of the soil tests and arsenic in 3 of 6 of the tests and that HAP had not disclosed this information;
- HAP's own consultant stated [Page 2 of Exhibit 13] that the objective of the data was to confirm the elevated arsenic concentrations at location B-1 and to evaluate potential arsenic concentrations in the proposed playground area;
- The report states that the play area was selected because it represents the location where the most sensitive population, i.e. children, will experience the greatest exposure. The report concludes that the site may have been an apple orchard in the past and it appears that the chemicals are attributed to lead and arsenic based pesticides;
- The report states that, although the detection is not reportable, the Massachusetts Contingency Plan requires that actions be taken to limit risks to persons using the site. The report recommends the civil engineering design firm consider burial of near surface soils.

Ms. Hardee stated the following:

- The issue is not within the Board's jurisdiction;
- The issue before the Board is to determine whether the Building Commissioner correctly or incorrectly issued the building permits. If there was an issue that the Board thought should have been addressed about the former use of the premises as an apple orchard, it should have been addressed then;
- The issue is not related to the Comprehensive Permit, which allows for projects to receive waivers from town bylaws, and that raising this issue now is intended to divert attention away from the issuance of four (4) building permits.

Mr. Ehrgood asked Mr. Quinn what the legal basis is for Zoning Board of Appeals to act on this information. Mr. Quinn stated that the Comprehensive Permit is to build a project that would house families with children who will play in contaminated soils unless the developer addresses those contaminated soils. HAP recently applied for funding from state and federal agencies and did not make any reference to the 2002 report.

Mr. Ehrgood asked why he did not include this information in the original appeal to be heard as part of this proceeding. Mr. Quinn stated that he wasn't sure it was appropriate to bring it to the Board's attention.

Mr. Ehrgood asked if the information regarding the soil was obtained before January 1, 2009. Mr. Quinn replied that the information was obtained during litigation and noted that the soil samples were taken in October and November of 2001 and the report was issued in March of 2002.

Mr. Bard stated the following:

- Mr. Quinn is arguing that the building permits be revoked due to the presence of hazardous materials on the site. The argument would be that there was a willful withholding of information and that a Board could revoke a permit if information was proven to be mis-represented and the permit granted under a false premise;
- Based on what has been presented thus far, the issue of soil contamination does not rise to the level of being a release, but is more of a residue from agricultural uses of the land which is widespread through the valley;
- A Comprehensive Permit is based on a review of all the local permits or bylaws from which waivers might have been sought. He doesn't believe that the issue of contaminated soils would have come up through the local permitting process;
- The matter may or may not be a significant issue, but that not every significant issue goes before the Zoning Board of Appeals in a Comprehensive Permit.

Ms. Greenbaum MOVED to continue the public hearing to August 25, 2009 at 7:30 P.M. Mr. Simpson seconded the motion and the Board VOTED unanimously to continue the public hearing to August 25, 2009 at 7:30 P.M the public hearing.

**Continued Public Hearing:** August 25, 2009

Mr. Simpson identified items received since the July 23, 2009 public hearing for the record and asked if there is any new information to be presented.

Mr. Quinn submitted a partial copy of Section 20 of Chapter 40B and a copy of HAP's original application for the Comprehensive Permit.

Mr. Quinn stated the following:

- Section 20 of Chapter 40B states that a developer may not override local regulations if the regulations are reasonably designed to protect the public health and safety of potential occupants and/or residents of the Town;



- HAP's original application for the Comprehensive Permit states that the seller was not aware of any releases of hazardous substances
- The OTO report of March 5, 2002, which contained recommended remedial measures should have been presented to the Zoning Board of Appeals;
- Because HAP did not inform the ZBA of the findings of the report, the Comprehensive Permit should be revoked and, at a minimum, the building permits should be rescinded until the remedial actions are properly addressed;
- The Board should require HAP to do the following: 1) hire an independent structural engineer to assess the condition of the existing farmhouse, 2) perform new storm water calculations and obtain approval of the plan by the Town Engineer, and 3) retain an environmental consultant to assess the scope of contamination on site and present the remedial actions to the Zoning Board.

Ms. Hardee stated the following:

- The staff memorandum dated August 21, 2009, which outlined the Zoning Board's jurisdiction regarding the contaminated soils and Mr. Bard's letter of August 25, 2009 which addresses the Board's jurisdiction regarding wetlands, both identified the relevant issues;
- There is no local permit that regulates contaminated soils;
- HAP is working with an environmental consultant to address the onsite contamination;
- The Board should close the hearing and uphold the building permits issued by the Building Commissioner.

Mr. Ehrgood asked Mr. Quinn which local laws regulate contaminated soils and what the legal basis is for the Board to consider this issue. Mr. Quinn stated that the issue is related to public health and safety and, therefore, should be addressed by the Zoning Board of Appeals and noted that Chapter 40B requires the Board to protect the health and safety of inhabitants of a development and the Town. Mr. Ehrgood stated that the level of contamination was not reportable to the Massachusetts Department of Environmental Protection and is not required to be reviewed by the Zoning Board because there are no local laws that regulate contaminated soils.

Ms. Greenbaum asked Mr. Quinn to identify the locations where the contaminated soils exist. Mr. Quinn referred to the OTO report which states that the elevated level of arsenic was at the location of the playground area shown on the 2001 plans. He stated that although the level of contamination was not reportable, the soils must be handled properly and requested the Board to require a written management plan. Ms. Greenbaum stated that the location of the play area has been moved from the contaminated site and that it is HAP's responsibility to ensure that the soils are properly handled during construction.

Mr. Bard stated that, since the last hearing, he has reviewed the issue and maintains that the Zoning Board of Appeals is not the arbiter of every important issue. The issue of contaminated soil is not one that is regulated by a local board and, therefore, is not within the jurisdiction of the Zoning Board of Appeals.

Doris Goodwin, 72 West Pomeroy Lane, and John Boothroyd, 22 Longmeadow Drive, stated that the Zoning Board of Appeals has an obligation to protect the health and safety of the residents of Amherst and those who may live on the site. Ms. Goodwin asked who is responsible for addressing issues of liability that could arise from the existence of contaminated soils.

Mr. Bard noted that the property is under private ownership and the project will be built by a private organization. As such, any site conditions that might lead to some form of liability would be solely the responsibility of the property owner.

Ms. Greenbaum moved to close the evidentiary portion of the public hearing. Mr. Ehrgood seconded and the Board VOTED to close the evidentiary portion of the public hearing.

**Public Meeting:**

Mr. Simpson summarized the appeal. He stated that the Zoning Board of Appeals has been asked to act as follows:

- A. To withdraw the four (4) building permits issued for the project based upon the following significant changes to the plans approved in 2001:
  - Alterations to the grading and drainage plan;
  - Re-location and re-arrangement of the play area;
  - Increase in the amount of impervious surfaces including sidewalks and bulkheads;
  - Destruction of a portion of an isolated wetland for construction of the access driveway;
  - Possible contamination of on-site soils with lead and arsenic.
- B. To inspect the existing farmhouse to determine if it is capable of being renovated; and
- C. To inform HAP that the existing farmhouse shall not be demolished unless the Comprehensive Permit is amended.

**Specific Findings:**

Based upon the testimony and submitted documentation, the Board found the following:

1. The Board found that the existing farmhouse will not be demolished and is proposed to be preserved and renovated. The Board found that although the Comprehensive Permit decision indicates that HAP will preserve and renovate the existing farmhouse, there are no specific conditions in the Comprehensive Permit requiring that the farmhouse be preserved and renovated. The Board noted that the 2008 plans have been prepared by a licensed architect and that representatives of HAP testified that the farmhouse will be preserved and renovated in accordance with their statements cited in the decision of the Comprehensive Permit and will not be demolished. The Board noted that the testimony of the Building Commissioner indicated that the Construction drawings for the farmhouse show it will be preserved and renovated and further that the project architect is responsible for completing the construction in accordance with the Building Permit and 2008 Construction drawings.
2. The Board found that changes to the area of impervious surfaces and drainage system design are not legally significant. The Board found that the changes to the plans showing revised sidewalk locations, re-distribution of bulkheads and alterations to the drainage system design are *de minimis*, do not change the significance or scope of the project, and are not a significant departure from the plans 2001 plans. The Board found that the changes to the drainage system design are those that may be expected in the progression from preliminary plans to final construction plans. The Board noted that HAP's consultant testified that the area of impervious sidewalks is less than what was originally proposed and that the 2001 plan contained eight bulkheads on one building where the 2008 plan contains six bulkheads distributed on four buildings and is fewer than originally proposed.
3. The Board found that the increased wetland area is not a legally significant change. The Board found that the location of the proposed roadway had not changed. The Board noted that Town Counsel indicated in the letter dated August 25, 2009, that the Zoning Board of Appeals maintains jurisdiction over the wetlands on site. The Board noted that the Town Wetland Bylaw allows for the replication of wetlands and that HAP proposes to replicate the isolated wetland at a 1.5 to 1 ratio. The Board noted that the Amherst Wetland Bylaw requires wetland replication at a ratio of 2 to 1. The Board determined that HAP should undertake the wetland replication in accordance with the standards of the Amherst Wetland Bylaw as to procedure and method, including replacement at a 2 to 1 ratio.

4. The Board found that the issue of contaminated soils on the site is not within the jurisdiction of the Zoning Board of Appeals. The Board noted that the issue of contaminated soils has been known by both parties for approximately six (6) years, as acknowledged by the petitioner, and identified in the letter from Felicity Hardee, dated August 6, 2009 and that none of the levels of contaminants, except in one location, was of a level reportable to the Massachusetts Department of Environmental Protection, as identified in the letter from Robert Quinn, dated August 18, 2009. The Board noted that HAP had hired an environmental consultant to determine the nature and extent of possible soil contamination which resulted in the report prepared by OTO, dated March 5, 2002, that indicated and recommended appropriate remedial actions.
5. The Board found that the re-location and reconfiguration of the proposed play ground area is not a legally significant change. The Board noted that the 2001 permit requires only that a play area be included in the project and that the approved 2001 plans only show a non-descript play area without specifications pertaining to structures, size or materials. The Board found that the 2008 plans include a detail plan of the structures to be installed and that HAP's consultant testified that the play area shown on the 2008 plans would actually be larger than the play area shown on the 2001 plans.
6. The Board determined that it will send a letter to the Amherst Board of Health indicating that the issue of contaminated soils on the site had been brought to the attention of the Zoning Board of Appeals and will request the Board of Health to follow-up as may be appropriate.

#### **Public Meeting – Zoning Board Decision**

Mr. Simpson made a motion to DENY the petitioner's request that the Zoning Board of Appeals order the withdrawal of the four (4) building permits issued on March 17, 2009, the request that the Zoning Board of Appeals inspect the farmhouse and determine whether it is capable of being renovated, and the request that the Zoning Board of Appeals inform HAP that the farmhouse shall not be demolished; to REQUIRE the replication of the isolated wetland in accordance with the standards of the Amherst Wetland Bylaw, including replacement at a 2 to 1 ratio; and to SEND a letter to the Amherst Board of Health advising that contaminated soils have been found on the site.

Ms. Greenbaum seconded the motion and the Board VOTED unanimously.

\_\_\_\_\_  
THOMAS SIMPSON

\_\_\_\_\_  
HILDA GREENBAUM

\_\_\_\_\_  
TOM EHRCOOD

FILED THIS \_\_\_\_\_ day of \_\_\_\_\_, 2009 at \_\_\_\_\_,  
in the office of the Amherst Town Clerk \_\_\_\_\_.

TWENTY-DAY APPEAL period expires, \_\_\_\_\_ 2009.

NOTICE OF DECISION mailed this \_\_\_\_\_ day of \_\_\_\_\_, 2009  
to the attached list of addresses by \_\_\_\_\_, for the Board.

NOTICE OF PERMIT or Variance filed this \_\_\_\_\_ day of \_\_\_\_\_, 2009,  
in the Hampshire County Registry of Deeds.